

# Averting Risk In Back-To-Work Vaccine And Screening Policies

By **Deisy Castro, Dana Feinstein and Samuel Stone** (May 3, 2021)

The COVID-19 pandemic rapidly changed and continues to change the nature of the workplace, requiring employers to act quickly in response.

Over a year later, as more and more employees return to common workspaces and access to COVID-19 vaccines increases, employers are faced with new challenges and are being asked to justify past decisions, while trying to quickly prepare return-to-work policies.

In order to smoothly transition back to work, employers should evaluate their existing policies and procedures regarding COVID-19 screenings and vaccinations in order to comply with emerging laws and guidance.

## **Compensation Considerations for Time Spent Completing COVID-19 Health Screenings**

Employers assessing how to safely operate during the COVID-19 pandemic have had to rapidly evaluate ever-changing federal, state and local guidance in order to minimize risk to their employees, vendors and consumers.

Accordingly, many employers have instituted COVID-19 screening policies and procedures, such as checkpoints, temperature screenings and questionnaires.

Such screening procedures invariably raise questions related to the compensability of time spent by employees undergoing such screening procedures, in addition to any additional compensation owed to employees who are turned away after exhibiting COVID-19 symptoms.

The extent to which time spent undergoing COVID-19 screenings, including any time spent waiting in line for such screenings, is compensable, will likely depend on multiple factors.

These factors relate to each employer's particular procedure and circumstances; the nature of the employee's job; whether the screenings are performed on-site, and the location of the employer's worksite; and any applicable regulations and administrative guidance.

For instance, the U.S. Department of Labor's Wage and Hour Division recently published guidance addressing the compensability of temperature checks and health screenings under federal law.[1]

Although the guidance suggests that such time may be compensable if the screening is integral and indispensable to the employee's job due to the nature of the employee's position — e.g., a nurse — the guidance does not provide any clear or definitive rule for employers to adopt concerning the compensability of the time.

Additionally, the guidance cautions that greater protection for workers may exist under state and local laws than under the federal Fair Labor Standards Act.



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As a novel issue, employers may find guidance to navigate this issue by looking at how courts have interpreted state and federal laws related to such issues as the compensability of pre- and post-shift security screenings and de minimis time standards.[2]

Employers may also consider guidance provided by state administrative agencies, such as California's Division of Labor and Standards Enforcement, which has published guidance suggesting that such COVID-19 screening time is compensable.[3]

But employers should remember that, although such guidance can signal the agency's position at administrative hearings, courts have made clear that such guidance is not binding and, as such, is subject to reversal and also nonadherence to the guidance outside of the agency setting.

On-site temperature and health screenings for COVID-19 symptoms also raise the question of whether employees who are sent home for exhibiting symptoms are entitled to additional compensation, or so-called reporting-time pay.

At least eight states, including California, Connecticut, Massachusetts, New Hampshire, New Jersey, New York, Oregon and Rhode Island, in addition to Washington, D.C., have laws requiring employers to pay employees at least one to four hours of pay if the employee is required to report to work, does so, and is sent home without working at least half of their shift.[4]

It has yet to be definitely determined whether an employee's COVID-19 symptoms provide an arguable basis for an exception, if any, to an employer's legal obligation to provide reporting time pay.

For example, an employer may argue that the employee's COVID-19 symptoms are a "cause not within the employer's control." [5] But employers relying on such limited exceptions, which do not exist under all of the aforementioned state laws, must be prepared to defend their position, particularly in cases where agency guidance has taken a contrary position, such as in California.[6]

Unsurprisingly, over a year into the COVID-19 pandemic, a wave of civil class and representative litigation has emerged arising out of the compensability of COVID-19-related temperature and health screenings.[7] It is expected that many more wage and hour class, collective and representative actions, which are being asserted under both federal and state laws, will undoubtedly continue to be filed in courts nationwide.

Accordingly, employers would likely benefit from reviewing their current COVID-19 screening guidelines and procedures in order to assess whether any such potential wage and hour exposure exists, and what changes, if any, could be implemented.

### **Potential Dangers Arising Out of Mandatory Employee Vaccination**

Many employers, reluctant to leave vaccination up to employee goodwill and eager to get back to business as usual, are exploring the possibility of mandating employee vaccinations. Although states have largely taken the lead in distributing vaccines, the federal government has developed guidance and regulations for employers seeking to create vaccination policies.

The U.S. Equal Employment Opportunity Commission has issued guidance permitting

employers to require mandatory vaccinations of employees.[8]

But employers seeking to require COVID-19 vaccinations — as opposed to simply encouraging them — must also follow guidance from the U.S. Department of Labor's Occupational Safety and Health Administration regarding recording adverse vaccination events.[9]

OSHA guidance states that employers who require COVID-19 vaccinations must record any employee's adverse reaction to the vaccine if it: (1) led the employee to miss more than one day of work; (2) required medical treatment beyond first aid; or (3) resulted in restricted work or transfer to another job.

Employers should also consider providing leave to employees to account for potentially adverse side effects of the vaccine, if not already required to do so by local or state law.

This will encourage employees to be vaccinated by eliminating any concerns about whether to take time off from work or use vacation time in order to obtain the vaccine.

In fact, on April 21, President Joe Biden called on employers to provide paid leave to employees for vaccination, and announced a new tax credit to fully offset the cost for small businesses and nonprofits who provide paid leave for employees to get vaccinated.[10]

In addition, employers requiring vaccination must also ensure that they accommodate employees pursuant to the requirements of the Americans with Disabilities Act.

If an employee informs her employer that she cannot take a COVID-19 vaccine due to disability, the employer must conduct an analysis to determine whether the employee would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." [11]

This analysis of the individualized employee's job requirements requires consideration of: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

After conducting such an analysis, the employer should engage in an interactive dialogue with the employee in order to determine if a reasonable accommodation would allow the employee to perform her job without imposing an undue hardship on the employer.

If the employer determines that no reasonable accommodation can reduce the risk — including teleworking or a leave of absence — then the employer may consider terminating the employee.

An employer should conduct a similar analysis if an employee refuses to be vaccinated pursuant to a sincerely held religious belief, which is protected by Title VII of the Civil Rights Act. In conducting such an analysis, the employer must also take state and local laws into consideration.

Depending on the employer's location, state and local laws may provide significantly more protection to employees than federal law.

Adhering to federal guidance and state and local regulations will reduce the potential for liability if employees challenge mandatory vaccination policies, as some have begun to

do.[12]

In addition, employers should anticipate the possibility that employees will challenge mandatory vaccination policies based on the theory that the current COVID-19 vaccines are only authorized through emergency use authorization, which does not constitute full licensure under the U.S. Food and Drug Administration guidelines.

Individuals who receive vaccines that are approved under emergency use authorization must be informed that they have the option to accept or refuse administration.[13]

Although courts have not yet interpreted this language in the context of the COVID-19 vaccine,[14] employers should be aware that such lawsuits may arise out of mandatory vaccination policies.

Although requiring employee vaccinations may appear to many employers as the most efficient way to return to normal, employers should consider applicable regulations and guidance, their employee populations, and the nature of their business in order to develop a vaccination policy that best fits their needs.

### **Navigating State and Local Vaccination-Related Laws**

Irrespective of employers' attitudes regarding the safety, efficacy or advisability of COVID-19 vaccinations, employers will be forced to navigate an increasing patchwork of state and local regulations designed to protect employees from retaliation for receiving — or not receiving — a vaccine.

These laws run the gamut from protected leave for vaccination-related purposes, to prohibitions on requiring proof of vaccination, to outright prohibitions on adverse employment action based on immunization status. Employers should consider how these different policies and practices overlap and potentially interfere.

Despite Biden's request that employers voluntarily provide leave to employees to get vaccinated, the absence of federal legislation mandating such leave has allowed municipalities and states to create a variety of different proposals to fill the gap. Some cities and states have mandated that employers provide a separate bank of time for COVID-19-related leave.

Such jurisdictions include:

- California: up to 80 hours of supplemental paid sick leave for reasons related to COVID-19 reasons, including vaccination and vaccine recovery;[15]
- Colorado: up to 80 hours of supplemental paid sick leave for covered reasons;[16]
- New York state: up to four hours of supplemental paid sick leave per vaccine dose;[17]

- Philadelphia: up to 80 hours of supplemental paid sick leave;[18] and
- Boston: up to three working days of vaccine paid sick leave for city employees.[19]

Additionally, a growing number of cities and states have expanded or clarified current paid sick leave laws to specify that vaccine-related leave is covered.

Washington, for example, specified that employees may use accrued paid sick leave for voluntary vaccinations during scheduled work hours.[20]

Nevada has taken a similar path, suggesting that "employees that choose to obtain the vaccine voluntarily should be allowed to utilize leave, paid leave, or the possibility of flex time" to obtain the vaccine.[21]

Overall, the clear and growing trend is to implement some sort of protected leave for employee vaccinations, or to strongly encourage providing paid leave for vaccination purposes.

For example, guidance issued by the Illinois Department of Labor states that employees "should be allowed to utilize sick leave, vacation time or other paid vacation time for employees to receive the 1st or 2nd dose of the COVID-19 vaccine." [22]

Just as many states are taking steps to ensure employees have access to protected leave to get vaccines, there is an equal push to ensure that nonvaccinated individuals are protected against employment discrimination or retaliation.

For example, on April 26, Arkansas passed legislation prohibiting state and local agencies and officials from using so-called vaccine passports, or documentation of an individual's COVID-19 vaccine or test status, for any reason, and prohibiting conditioning employment, travel, education, or receipt of services on holding or displaying a vaccine passport.[23]

Minnesota is exploring similar restrictions with proposed legislation prohibiting businesses from requiring patrons or customers from providing proof of vaccination[24] and prohibiting private employers from requiring employees to obtain a vaccine.[25]

Other states considering similar restrictions on disclosure of employees' vaccination status or using nonvaccination status to make employment decisions include, but are not limited to, Alaska, Arizona, Georgia, Indiana, Louisiana, Montana, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Texas and Virginia.[26]

While the proposed and enacted legislation tends to preclude employers from taking adverse employment action based on employees' vaccination status — regardless of what that status is — some states' proposals expressly prohibit taking action against employees who refuse COVID-19 vaccines.

Such states include South Carolina, Pennsylvania and Maryland.[27] Maryland's proposal contains an interesting trade-off that may grow in popularity, in that employees are permitted to refuse vaccination and are protected from retaliation for such, but in exchange, unvaccinated employees waive the right to file a civil action if they contract COVID-19 in the

workplace.[28]

While employers may have a strong interest in ensuring employees are vaccinated, they must pay careful attention to avoid running afoul of the myriad laws and proposed statutes prohibiting disparate treatment based on vaccine status.

### **Looking Forward**

Just as the COVID-19 pandemic has drastically transformed the workplace, the after-effects of COVID-19-related legislation and guidance will reverberate in the courts for many years to come.

As employers continue to do their best to grapple with these and other novel legal issues and evolving federal, state, and local laws and regulations, they should be mindful of emerging administrative agency enforcement activity and litigation in order to assess and respond to any potential risk that may exist.

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[1] U.S. Dep't of Labor, Wage and Hour Division, COVID-19 and the Fair Labor Standards Act Questions and Answers (last visited April 27, 2021), <https://www.dol.gov/agencies/whd/flsa/pandemic#4>.

[2] See *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27 (2014) (holding that post-shift security checks are not compensable under federal law, even when mandatory, if they are not "integral and indispensable" the employee's principal activities); see also *Frlekin v. Apple, Inc.*, 8 Cal. 5th 1038 (2020) (holding that time spent on employer's premises waiting for and undergoing mandatory security checks of bags and devices brought for personal convenience is compensable under California law).

[3] State of California Dep't of Indus. Relations, Labor Commissioner's Office, Safe Reopenings FAQs for Workers and Employers (July 28, 2020), [https://www.dir.ca.gov/covid19/FAQs\\_COVID-19\\_Safe\\_Reopening.htm](https://www.dir.ca.gov/covid19/FAQs_COVID-19_Safe_Reopening.htm).

[4] See, e.g., California Wage Orders 1-16, § 5; Conn. Agencies Regs. 31-62-D2(d); 454 Mass. Code Regs. 27.04(1); N.H. Rev. Stat. § 275:43-a; N.J. Admin. Code § 12:56-5.5; 12 CRR-NY 142-2.3; Or. Admin. R. 839-021-0087(5); 28 R.I. Gen. Laws § 28-12-3.2(a); D.C. Mun. Regs. tit. 7, § 907.

[5] See California IWC Wage Orders 1-16, § 5(C).

[6] State of California Dep't of Indus. Relations, Labor Commissioner's Office, FAQs on Laws Enforced by the California Labor Commissioner's Office (last visited Apr. 27, 2021), <https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm>.

[7] See, e.g., Boone, et al. v. Amazon Services, LLC, E.D. Cal. Docket No.1:21-cv-00241; Haro, et al. v. Walmart Inc., E.D. Cal. Docket No. 1:20-cv-00239; Harwell-Payne, et al. v. Cudahy Place Senior Living, LLC, et al. W.D. Wis. Docket No. 3:20-cv-00804; Hernandez Solis, et al. v. The Merchant of Tennis, Inc., C.D. Cal. Docket No. 5:21-cv-00459; Hogan, et al. v. Hot Springs Nursing and Rehabilitation-a Waters Community, LLC, W.D. Ark. Docket No. 6:20-cv-06130.

[8] What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, The U.S. Equal Employment Opportunity Commission, April 26, 2021, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

[9] Frequently Asked Questions, United States Department of Labor Occupational Safety and Health Administration, April 26, 2021, available at <https://www.osha.gov/coronavirus/faqs#vaccine>.

[10] Biden asks U.S. employers to give workers paid time off to get vaccinated, The New York Times, April 26, 2021, available at <https://www.nytimes.com/2021/04/21/world/biden-covid-vaccine.html>; see also The White House, Briefing Room, Statements and Releases, April 21, 2021, Fact Sheet: President Biden to Call on All Employers to Provide Paid Time Off for Employees to Get Vaccinated After Meeting Goal of 200 Million Shots in the First 100 Days, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/21/fact-sheet-president-biden-to-call-on-all-employers-to-provide-paid-time-off-for-employees-to-get-vaccinated-after-meeting-goal-of-200-million-shots-in-the-first-100-days/>.

[11] 29 C.F.R. 1630.2(r).

[12] See, e.g., California Educators for Medical Freedom et. al. v. The Los Angeles United School District et al, C.D. Cal. Docket No. 2:21-cv-2388, Isaac Legaretta et. al. v. Fernando Macias et. al., D.N.M. Docket No. 2:21-cv-179.

[13] 21 U.S.C. § 3560e(1)(A)(ii)(III).

[14] Efthimios Parasidis and Aaron S. Kesselheim, Assessing The Legality of Mandates for Vaccines Authorized Via An Emergency Use Authorization. Health Affairs Blog (February 16, 2021). Retrieved from <https://www.healthaffairs.org/doi/10.1377/hblog20210212.410237/full/>.

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